PERTINENT EXCERPTS FROM THE STATUTES INVOLVED

CHAPTER 21A.—TOBACCO INSPECTION, Sec. 511(f):

"Tobacco" means tobacco in its unmanufactured form".

Sec. 511a. Declaration of Purpose:

"Transactions in tobacco involving the sale thereof at auction as commonly conducted at auction markets are affected with a public interest; such transactions are carried on by tobacco producers generally and by persons engaged in the business of buying and selling tobacco in commerce; the classification of tobacco according to type, grade, and other characteristics affects the prices received therefor by producers; without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in price, and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce; such fluctuations constitute a burden upon commerce and make the use of uniform standards of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein".

Section 511b. Official standards for classification; tentative standards; modification

"The Secretary is authorized to investigate the sorting, handling, conditioning, inspection, and marketing of tobacco from time to time, and to establish standards for tobacco by which its type, grade, size, condition, or other characteristics may be determined, which standards shall be the official standards of the United States, and shall become effective immediately or upon a date specified by the Secretary: Provided, That the Secretary may issue tentative standards for tobacco prior to the establishment of official standards therefor, and he may modify any standards established under authority of this chapter whenever, in his judgment, such action is advisable".

Section 511g. Placing of grade on warehouse tickets, etc.; form

"Warehousemen shall provide space on warehouse tickets or other tags or labels used by them for showing the grade of the lot covered thereby as determined by an authorized tobacco inspector under this chapter. The Secretary may prescribe, by regulation, the form in which such certification of grade shall be shown, and may require that a copy of such warehouse ticket, tag, or label shall be furnished to the Secretary".

Section 511i(c) (Offenses)

"For any person, not an authorized inspector under this chapter, to issue a certificate or report stating the type, grade, size, or condition of any lot of tobacco to be in accordance with the standards of the United States therefor which is of such color, size, arrangement, or wording as to be mistaken for a certificate issued under this chapter, unless such certificate states in prominent letters in its heading that it is not issued under authority of the United States".

CHAPTER 21B. U S C A—TOBACCO CONTROL

Section 515 * * * limitation on consent:

"That nothing in said sections shall be construed to grant the consent of Congress to negotiate any compact for regulating or controlling the production of, or commerce in, tobacco for the purpose of fixing the price thereof, or to create or perpetuate monopoly, or to promote regimentation, but such consent shall be limited to compacts for the regulation and control of production of, or commerce in, tobacco in order thereby to enable growers to receive a fair price for such tobacco".

Sec. 515a. Definitions:

"'Kind of tobacco' means one or more types of tobacco as classified in Service and Regulatory Announcement Numbered 118 of the Bureau of Agricultural Economics of the

United States Department of Agriculture as listed below according to the name or names by which known:

Types 11, 12, 13, and 14, known as flue-cured tobacco".

CHAPTER 26, U S C A—AGRICULTURAL ADJUSTMENT ACT

Sec. 602(1)—Declaration of Policy, etc.:

"Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a) (1) of this title".

Sec. 608b. Marketing agreements; exemptions from anti-trust laws:

"In order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623 and 624 of this title the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the anti-trust laws of the United States, and any such agreement shall be deemed to be unlawful:"

Sec. 608c. (1) Orders regulating handling of commodity —issuance by Secretary:

"The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601-

608, 608a, 608b, 608c, 608d, 612, 613, 614-619, 620, 623, and 624 of this title as "handlers." Such orders shall regulate in the manner hereinafter in this section provided only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in such commodity or product thereof".

Sec. 608(3)—Notice and hearing

"Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order".

Sec. 608(4)—Finding and issuance of order

"After such notice and opportunity for hearing the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to such commodity".

Sec. 608c (8)—Orders with marketing agreement

"—no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations or producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such

order,'"*—"Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored: (A) By at least two-thirds of the producers who * * * during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or (B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order."

Orders with or without marketing agreement

"(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers * * * of more than 50 per centum of the volume of the commodity or product thereof * * * covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, determines: (A) That the refusal or failure to sign a marketing agreement * * * by the handlers * * * of more than 50 per centum of the volume of the commodity or product thereof * * * specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to such commodity or product, and (B) That the issuance of such order is the

only practical means of advancing the interest of the producers of such commodity pursuant to the declared policy and is approved or favored: (i) By at least two-thirds of the producers * * * who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or (ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order."

"Manner of regulation and applicability

"No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held."

CHAPTER 35 U S C A:

Sec. 1282.—Declaration of policy

"It is declared to be the policy of Congress to continue the Soil Conservation and Domestic Allotment Act, as amended, for the purpose of conserving national resources, preventing the wasteful use of soil fertility, and of preserving, maintaining, and rebuilding the farm and ranch land resources in the national public interest; to accomplish these purposes through the encouragement of soil building and soil conserving crops and practices; to assist in the marketing of agricultural commodities for do-

mestic consumption and for export; and to regulate interstate and foreign commerce in cotton, wheat, corn, tobacco, and rice to the extent necessary to provide an orderly, adequate, and balanced flow of such commodity in interstate and foreign commerce through storage of reserve supplies, loans, marketing quotas, assisting farmers to obtain, insofar as practicable, parity prices for such commodities and parity of income, and assisting consumers to obtain an adequate and steady supply of such commodities at fair prices."

SUB CHAPTER II; CHAPTER 35 U S C A—

"(6) (A)" 'Market' in the case of * * * tobacco * * * means to dispose of, in raw or processed form, by voluntary or involuntary sale, barter, or exchange, or by gift inter vivos, * * * (7) " 'Marketing year' means, in the case of the following commodities, the period beginning on the first and ending with the second date specified: * * * tobacco (flue-cured), July 1-June 30;"

(Sec. 1301(13) " 'Tobacco' means each one of the kinds of tobacco listed below comprising the types specified as classified in Service and Regulatory Announcement Numbered 118 of the Bureau of Agricultural Economics of the Department: Flue-cured tobacco, comprising types 11, 12, 13, and 14;"

CHAPTER 35 U S C A, Sec. 1340 (10)

"The Commodity Credit Corporation is directed to make available upon the 1941, 1942, 1943, 1944, 1945 and 1946 crops of the commodities cotton, corn, wheat, rice, tobacco and peanuts, for which producers have not disapproved marketing quotas for the marketing year beginning in the calendar year in which such crop is harvested, loans as follows:"

Sec. 1375—Regulations

"(a) The Secretary shall provide by regulations for the identification, wherever necessary, of corn, wheat, cotton, rice, peanuts, or tobacco so as to afford aid in discovering and identifying such amounts of the commodities as are

subject to and such amounts thereof as are not subject to marketing restrictions in effect under this chapter.
(b) The Secretary shall prescribe such regulations as are necessary for the enforcement of this chapter."

CHAPTER 35A, U S C A—Sec. 1421

(a) The Secretary shall provide the price support authorized or required herein through the Commodity Credit Corporation and other means available to him.
(c) Compliance by the producer with acreage allotments, production goals and marketing practices (including marketing quotas when authorized by law), prescribed by the Secretary, may be required as a condition of eligibility for price support."

Sec. 1423—Adjustment of Support Prices

"Appropriate adjustments may be made in the support price for any commodity for differences in grade, type, staple, quality, location, and other factors. Such adjustments shall, so far as practicable, be made in such manner that the average support price for such commodity will, on the basis of the anticipated incidence of such factors, be equal to the level of support determined as provided in this Act. Middling seven-eights inch cotton shall be the standard grade for purposes of parity and price support."

Sec. 1428—Determinations of Secretary as final and conclusive

"Determinations made by the Secretary under this Act shall be final and conclusive: Provided, That the scope and nature of such determination shall not be inconsistent with the provisions of the Commodity Credit Corporation Charter Act."

SUB-CHAPTER II, CHAPTER 35A, U S C A:

Sec. 1441—Price Support Levels

"The Secretary of Agriculture (hereinafter called the 'Secretary') is authorized and directed to make available through loans, purchases, or other operations, price sup-

port to cooperators for any crop of any basic agricultural commodity, if producers have not disapproved marketing quotas for such crop, at a level not in excess of 90 per centum of the parity price of the commodity nor less than the level provided in subsections (a), (b), and (c) of this section as follows:"

"(c) For tobacco, if marketing quotas are in effect, the level of support shall be 90 per centum of the parity price."

TITLE 15, U S C A, Sec. 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: Provided, that nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title:"

SEC. 2.—Monopolizing trade a misdemeanor; penalty

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Sec. 13.

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purposes of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:"

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

Sec. 14. Sale, etc., on agreement to use goods of competitor

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any territory thereof, or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such

condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

CONSTITUTION OF THE UNITED STATES—FIFTH AMENDMENT * * * *

"nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation".

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7553

QUENTIN STROUD, ET AL., APPELLANTS,

versus

EZRA T. BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA, ET AL., APPELLEES.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern.

(Argued January 17, 1958 Decided April 4, 1958.)

Before PARKER, Chief Judge, and SOPER and SOBELOFF, Circuit Judges.

Jesse A. Jones (Jones, Reed & Griffin, and M. E. Cavendish on brief) for Appellants; Samuel D. Slade, Attorney, Department of Justice, (George Cochran Doub, Assistant Attorney General; Julian T. Gaskill, United States Attorney, and Lionel Kestenbaum, Attorney, Department of Justice, on brief) for Appellee, Ezra T. Benson, Secretary of Agriculture, and William T. Joyner, for Appellee, Flue-cured Tobacco Cooperative Stabilization Corporation.

SOBELOFF, Circuit Judge:

A number of tobacco farmers instituted suit in the United States District Court for the Eastern District of North Carolina against the Secretary of Agriculture and others to contest the validity of provisions of the 1957 tobacco price support program which required certain varieties of tobacco, known as "discount varieties," to be identified as such when offered for sale on auction warehouse floors. The plaintiffs complained of arbitrary, unauthorized and illegal discrimination against these varieties and sought a declaration of invalidity, an injunction against the enforcement of the Secretary's rules and regulations complained of, and the termination of arrangements made for their implementation and enforcement.

In addition to the injunction against the regulations for identification of flue-cured[1] tobacco upon a variety basis, particularly by the issuance of different colored marketing cards and distinctive warehouse basket tickets, the plaintiffs sought that the Secretary and his co-defendants be "directed to support plaintiffs' flue-cured tobacco at 90% of parity." One of these other defendants is the Commodity Credit Corporation, a wholly owned corporate agency of the United States, through which the Secretary is authorized and empowered to provide funds for price support. This defendant is by statute immune from the injunctive process. 15 U. S. C. A., Sec. 714b(c). Loans are made by the Corporation as agent of the Secretary to another defendant, the Flue-Cured Tobacco Cooperative Stabilization Corporation of Raleigh, North Carolina, which is chartered under the State laws of North Carolina. The individual defendants, all North Carolinians, are those who constitute the Agricultural Stabilization and Conservation Committee of the United States Department of Agriculture for the State of North Carolina, and its administrative officer, or are managers of several County Agricultural Stabilization offices. These perform purely administrative duties in the execution of the regulations.

The background and development of the 1957 tobacco loan program, including the provisions under attack, may be briefly summarized. American produced flue-cured tobacco had for many years consistently commanded premium prices, especially from foreign buyers, because of its recognized "full-bodied," "full-flavored" and "aromatic" characteristics. As much as one-third to one-half of this country's production entered the export trade notwithstanding that lighter-bodied tobacco, deficient in the sought

[1] Jahn, Tobacco Dictionary (1954), p. 68:

"*Flue-cured tobacco*

"Tobacco cured in barns formerly heated by means of flues circulating the heat and carrying the smoke away. Flue-cured types, frequently spoken of as Bright Tobacco, are extensively grown in Virginia, northern and eastern North Carolina, eastern South Carolina, southeastern Georgia, and northern Florida. Flue-cured leaf is used in the manufacture of cigarettes and smoking and chewing tobaccos and for export."

after flavors and aromas, were available to foreign buyers at 50% or 80% of the cost of the American standard varieties.

In 1955 and 1956 the market was seriously disrupted by the appearance of three new varieties, known as Coker 139 and 140, and Dixie Bright 244. They were undesirable because wanting in the characteristics which distinguished American tobaccos. Tobacco known to be of these varieties brings much less than the established varieties. Yet they resembled the regular stock in appearance and could not be identified in cured leaf form when offered on the auction sale warehouse floors. Only after purchase was the deficiency discoverable, too late to give protection to the purchaser. The effect was loss of confidence in the tobacco offered at the auctions, and depressed prices for tobacco generally, because customers hesitated to pay full prices for an article liable to be of short quality.

Complaints from foreign and domestic buyers were numerous and persistent. The new varieties were definitely not wanted in the market but they offered one advantage to the grower; they were resistant to black shank and wilt and more pounds could be raised per acre of these than of the traditional varieties. A force that may be likened to Gresham's Law in finance was operating in the tobacco market to drive out the highly prized and higher priced varieties. The "discount" varieties were fast taking over. In 1956 as much as 50 to 60% of the tobacco planted was of this new category. As Judge Gilliam, in the District Court, found, the result was to visit a penalty on all producers of the desirable, and more valuable, standard American varieties, and 22.49% of the 1956 crop went into the stabilization pool under price supports. Another such season, the District Judge found, "would be disastrous, perhaps fatal, to the price support program."

The prospects for the future of the industry were indeed alarming. The Department of Agriculture counseled with scientists in agricultural colleges and experimental stations, representatives of the tobacco growing states and many persons engaged in all branches of the tobacco business, including growers. A plan was recommended almost unani-

mously for the identification of the objectionable varieties, by inspections during growth, and by laboratory examination of samples taken in the field. Only the breeder of the 139 and 140 seed and his chemist, and two other persons dissented. They favored a continuance of the grading methods which had prevailed before the discount varieties came upon the scene—methods which in recent experience had proved inadequate to the need.

The 1957 tobacco price support program adopted by the Secretary of Agriculture embodied the new features. As early as December 18, 1956, the Department announced that changes would be made in the 1957 flue-cured tobacco price support program to discourage production of varieties 139, 140 and 244, irrespective of grade, by supporting these varieties at one-half the support rates for others. It was also made known that support rates would be adjusted to reflect current demand patterns and to encourage cultural practices favoring increase in the proportion of the crop which has desirable flavor and aroma characteristics. Further announcements came in the winter and spring; one notice was mailed to each flue-cured producer about mid-January.

While the precise implementation of the plan for distinguishing varieties by use of different basket tickets was not made known before the beginning of the planting season, it was early declared and repeated that one condition of eligibility for full participation in price support benefits would be proof of the variety. As finally formulated the plan provided for varieties to be established by government inspection, photographs of the growing plants, laboratory examination of samples, as well as information from the farmers. The initial determination was to be made by the County Committee, consisting of farmers, subject to the grower's right to demand reconsideration by the Committee, and examination by variety-identification specialists other than those who previously examined the tobacco being grown on his farm.

On the auction warehouse sale floor the acceptable varieties were put in baskets bearing white marketing cards; the others in baskets bearing a distinguishable card

with two stripes printed thereon, and the latter tobaccos, under the plan, received one-half the support to which the others were entitled. The Secretary adopted the 50% fraction, because, according to his findings, it represented the average ratio of the worth of the discount varieties to the worth of regular varieties.

The effect of the plan was swift and impressive. Farmers readily conformed and bidders had the desired assurance that there was no danger of an admixture of unwanted varieties with the standard varieties. There came a sharp and radical reversal; instead of an estimated 50 to 60%, as in 1956, less than 2% of the farmers grew "discount varieties" in 1957. Instead of nearly one-fourth of the crop (22.49%) entering the stabilization pool, as in 1956, the 1957 season witnessed a dramatic restoration of confidence and wholesomeness in the market, and it is estimated that only three to four per cent of the crop had to enter the pool.

Motions to dismiss on jurisdictional grounds were interposed which, according to the opinion filed by the District Judge, he denied, despite doubts, in the belief that it would be in the public interest to decide the case on the merits. In a full and careful opinion he sustained the challenged regulations and procedures against every attack. The jurisdictional question, however, claims our attention and we are bound to deal with it despite the failure of the Secretary to cross appeal. *United States* v. *American Ry. Express Co.*, 265 U. S. 425 (1924); *Langnes* v. *Green*, 282 U. S. 531, 535 (1931); *Jaffke* v. *Dunham*, 352 U. S. 280 (1957).

We have recited the facts in detail sufficient to give an understanding of the nature of the case and the motion to dismiss.

In the case of the Secretary the answer to the jurisdictional question is clear. As his official residence is in the District of Columbia, only there may he be sued. *Butterworth* v. *Hill*, 114 U. S. 128 (1885); *Blackmar* v. *Guerre*, 342 U. S. 512 (1952); *Krug* v. *Fox*, 161 F. 2d 1013 (4 cir., 1947); *Berlinsky* v. *Woods*, 178 F. 2d 265 (4 cir., 1949); *Hunter* v. *United States*, 183 F. 2d 446 (4 cir., 1950).

But is the Secretary an indispensable party, without whom the litigation may not proceed against the remaining defendants? The decided cases do not seem at first glance to follow a consistent course, due largely to differences in the factual context in which the legal question arose; but the principle to be deduced is that one must look to the nature and effect of the proceeding and not merely to the names of titular parties. *Ex Parte State of New York, No. 1*, 256 U. S. 490, 500, (1921); *Land* v. *Dollar*, 330 U. S. 731 (1947). (If, broadly considered, the suit is in essence one against persons threatening the invasion of a private right, they may be enjoined. If they claim to be acting under an authority which the law does not recognize, the absence from the proceedings of the official whose unlawful orders they rely upon does not bar the action against them.) The rule was applied by this Court in *Ferris* v. *Wilbur*, 27 F. 2d 262, 264 (4 cir., 1928) in an opinion by Judge Parker:

> "Where the act complained of is not authorized by statute, or where the statute authorizing it is void because in conflict with some provision of the Constitution, the person attempting it may be restrained in a proper case, notwithstanding his claim that he is acting in his official capacity. In such case he is acting, not within the law, but outside it, his act is not the act of the government, and the law affords him no protection for what he is doing or is about to do. This is true, whether he be the head of a department or merely a subordinate acting under orders; and, if a subordinate, there is no necessity of joining as defendant the head of the department because the orders of the head are immaterial if the act sought to be enjoined is not authorized by law."

The decision follows the rule of *Colorado* v. *Toll*, 268 U. S. 228 (1925), where it was sought to enjoin the superintendent of a national park from exercising control over traffic therein. His right to do so was attacked by the State of Colorado on the ground that it had not ceded jurisdiction to the United States. The Supreme Court held that he could be proceeded against in a federal court, to restrain

him as an individual, without joining his superior officers. See also: *United States* v. *Lee*, 106 U. S. 196 (1882); *Goltra* v. *Weeks*, 271 U. S. 536 (1926).

Equally certain and confirmed by authority is the rule that if the judgment or decree granting the relief sought will require the superior officer to take action, either directly or through a subordinate, he is an indispensable party. Precisely in point is *Berlinsky* v. *Woods*, 178 F. 2d 265, 266 (4 cir., 1949), where Judge Soper said, "since . . . the purpose of the suit is to require [the Housing Expeditor] to take action in the exercise of his statuory powers, he is an indispensable party to the suit which cannot go on without him; and the case must therefore be dismissed as to the Area Rent Director and the Sheriff of Baltimore City."

Where the purpose of the suit against a subordinate was in reality to control the action of the Secretary of the Interior, the Secretary was held indispensable. *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28 (1897); and so also where the plaintiff demanded a more liberal permit than the defendant had power to grant under his delegated authority, the superior was ruled indispensable. *Guerich* v. *Rutter*, 265 U. S. 388 (1924). See also, *Webster* v. *Fall*, 266 U. S. 507 (1925); *Yarnell* v. *Hillsborough Parking Co.*, 70 F. 2d 435 (5 cir., 1934); *James* v. *Lake Wales Citrus Growers Asso.*, 110 F. 2d 653 (5 cir., 1940).

Especially is this rule applied where the judgment awarded would "expend itself on the public treasury or domain, or interfere with public administration." *Land* v. *Dollar*, 330 U. S. 731, 738 (1947). See also, *Williams* v. *Fanning*, 332 U. S. 490 (1947).

Here plaintiffs demand a doubling of their price support payments which can come only from moneys supplied by the United States. Such a case cannot be prosecuted without making the United States or the Secretary a party. We are dealing here with public money, not as in *Stark* v. *Wickard*, 321 U. S. 288, 305 (1944), with producers' money. It does not matter if the approach is indirect; the thrust of the suit which names others is in actuality against the Secretary and his administrative regulations. The impact would be on funds he administers by authority of

Congress. To borrow Justice Black's expression, "the Government's liability cannot be tried 'behind its back.'" See: *Mine Safety Co. v. Forrestal*, 326 U. S. 371, 375 (1945).

We have given consideration to the possibility that even apart from the prayer for a mandatory injunction for the payment of full price support, the plaintiffs might press their prayer for injunction against the marking of the baskets to distinguish varieties of tobacco. Our conclusion is against the suggestion. The marking of the baskets is only an administrative detail in the execution of the Secretary's regulations and cannot be adjudicated separately. The effect would be to nullify the regulations, because a restoration of the chaotic conditions of 1955-1956 would enlarge the volume of tobacco entering the stabilization pool and increase the burden on the public funds.

We are of the opinion that for want of a necessary party the motion to dismiss should have been granted on jurisdictional grounds. The order appealed from will accordingly be vacated, without any intimation, however, that the merits were not correctly decided by the District Judge, and the case will be remanded with direction that it be dismissed for lack of jurisdiction.

Vacated and Remanded with Direction to Dismiss Action.

(Judge Parker, who concurred in this opinion, died before its announcement.)

JUDGMENT

Filed and Entered April 1, 1958

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7555.

QUENTIN STROUD, ET AL., APPELLANTS,

vs.

EZRA T. BENSON, Secretary of Agriculture of the United States of America, TILMAN R. WALKER, W. E. MATTHEWS, ZENO RATCLIFF, JR. and D. S. WEAVER, Agricultural Stabilization and Conservation Committee of the United States Department of Agriculture; H. D. GODFREY, Administrative Officer; Flue-Cured Tobacco Cooperative Stabilization Corporation of Raleigh, North Carolina; Commodity Credit Corporation; HORACE NEWBORN, Manager, Lenoir County Agricultural Stabilization and Conservation Office; NELSON R. BARKER, Manager, Jones County Agricultural Stabilization and Conservation Office; S. T. BROWN, Manager, Duplin County Agricultural Stabilization and Conservation Office; et al., APPELLEES.

APPEAL FROM the United States District Court for the Eastern District of North Carolina

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, vacated, without any intimation, however, that the merits were not correctly decided by the District Judge; and that this cause be, and the same is hereby,

remanded to the United States District Court for the Eastern District of North Carolina, at New Bern, with direction that it be dismissed for lack of jurisdiction, in accordance with the opinion of the Court filed herein.

SIMON E. SOBELOFF,
United States Circuit Judge.
MORRIS A. SOPER,
United States Circuit Judge.

(653-6)